RESPONSIBILITY FOR CRIME BY CORPORATIONS[1]

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QUESTIONS relating to the legal regulation and control of the aggregations of men and money which we call corporations constitute one of the most serious problems now confronting the American people. To one sub-division of this problem I desire to direct your attention for a few minutes to-day—to the question in what manner the machinery of the criminal law should be used by the state in regulating the conduct of corporations.

Although this question is of unusual importance in modern times and in a country which either is or thinks itself trust-ridden, yet the problem as a whole is neither new nor American. Every law student has smiled at Coke's quaint dictum that corporations cannot be excommunicated because they have no souls; but few realize that Coke was merely stating the substance of an actual adjudication of Pope Innocent IV—his decision, as the court of last resort, upon what in his day was a very practical question, as to the application of the penal law of the church to the corporations of the thirteenth century. From time to time from that day to this, the criminal liability of corporations has been debated on the continent of Europe with a philosophical thoroughness unknown in this country.

The history and present status of the criminal liability of corporations in English-speaking countries may be briefly summarized. In 1613, Coke declared that a corporation could not commit treason.[2] In 1691, Lord Holt stated broadly that a corporation is not indictable, although the particular members

[1] Read at the Conference on the Reform of the Criminal Law and Procedure, May 13, 1911.

[2] Sutton's Hospital Case, 10 Coke 32b. In Y. B. 21 Ed. IV, folio 13, it was said that corporators as such could not commit treason or felony. To the same effect is Vin. Abr., tit. "Corporation," Z.

of it are.[1] In 1758, Blackstone, citing as his only authority Coke's dictum above referred to, declared that "a corporation cannot commit treason or felony or other crime in its corporate capacity; though its individual members may, in their distinct individual capacities."[2] Kyd in 1793 questioned the generality of some of the earlier dicta, but admitted that indictments for felonies or higher misdemeanors would not lie against a corporation.[3] Nevertheless, municipal corporations and quasi-corporations had been convicted and punished for failure to discharge a duty of repairing a highway or the like.[4] In 1842, the Court of Queen's Bench upheld an indictment against a railway company for failure to perform a specific duty imposed by statute;[5] and four years later the same court entered sentence against a similar corporation for misfeasance in maintaining a public nuisance,[6] although the court admitted that corporations could not commit treason, felony, perjury, offenses against the person, or any acts which derive their criminal character from the corrupted mind of the person committing them or which are violations of the social duties belonging to men and citizens. Recently, in America, corporations have been convicted of statutory crimes involving a particular intent,[7] and of criminal conspiracy,[8] while a majority of the Supreme Court of Canada seem to have thought that a corporation might be guilty of manslaughter.[9] Indeed, the authorities both in England and America seem tending mainly toward the view that there are no crimes—not even felonies involving a particular

[1] 12 Mod. 559.

[2] 1 *Black. Comm.*, 476.

[3] 1 *Kyd on Corporations*, 225–226.

[4] Rex *v.* Inhabitantes Civitates Norwici (5 Geo. 1), 1 Stra. 177; Rex *v.* Inhabitants of West Riding of Yorkshire (1802), 2 East 342; Rex *v.* Mayor, etc., of Stratford-upon-Avon (1811), 14 East 348; Rex *v.* Inhabitants of the Hundred of Oswestry (1817), 6 M. & S. 361.

[5] Regina *v.* Birmingham, *etc.*, Ry. Co., 3 Q. B. 223.

[6] Regina *v.* Great North of England Ry. Co., 9 Q. B. 315.

[7] United States *v.* John Kelso Co., 86 Fed. 304; State *v.* Rowland Lumber Co., 69 S. E. 58 (N. Car.).

[8] United States *v.* MacAndrews & Forbes Co., 149 Fed. 823; State *v.* Eastern Coal Co., 70 Atl. 1, 6–7 (R. I.).

[9] Union Colliery Co. *v.* Regina, 31 Canada Sup. Ct. 81.

intent—that are legally impossible of commission by corporations, although, of course, in cases where the only punishment is imprisonment, sentence cannot be imposed or executed upon a corporation.

I am to discuss, however, not so much what is, as what ought to be, the law of this subject. How far, then, ought punishment for criminal offenses to be visited upon corporations, and how far ought the penalties to be inflicted not upon the corporation but upon the individual officers or agents who act on its behalf? The objections to enforcing criminal penalties against a corporation are two: (1) that crime, save in a few exceptional cases, involves a corrupt mind, a *mens rea*, and that a corporation, having no mind, is incapable of possessing any such mental state, so that to visit a penalty upon the corporation would be to punish for an imaginary crime—a course abhorrent to justice; (2) that to punish a corporation would be unjust because the innocent members would suffer equally with the guilty.

So long as the criminal liability of corporations is confined to such crimes as nuisance, for which an individual master would be responsible if the act were committed by his servant without any fault on the master's part, the former objection is of little or no force; but when a corporation is accused of a crime which involves a wicked mind on the ground that the crime has been committed by the corporation in person, the objection becomes more formidable. Has a corporation a mind? Can it entertain a particular criminal intent? Can it act in person? The answer to these questions will depend in some measure upon our conception of the nature of a corporation.

The orthodox view has been that a corporation is a fictitious body, existing only in contemplation of law, without mind and without soul. But the dominant school of jurists in Germany, and probably also in other countries of continental Europe, now deny the truth of this conception. Led by Dr. Gierke of Berlin, they assert that a corporation is a real person, recognized but not created by the law. It is a *Gesamtperson*, a group-person. It possesses a real mind and a real will. It is as capable as a natural person of entertaining malice or a criminal

intent. When a corporation acts by an officer, it is not acting by an agent but by an "organ," just as an individual's hand is not his agent but is a part of the man himself. This is the reality theory of the nature of corporations.

If this theory, towards some form of which even Anglo-American jurisprudence seems upon the whole to be tending, is correct, then the objection that a corporation ought not to be punished for a crime involving a mental state because natural justice prohibits crime by fiction, falls to the ground.

The second objection—that to punish a corporation for crime is to punish the innocent members equally with the guilty[1]—remains for consideration. On this proposition Abraham based his argument on behalf of the Corporation of Sodom. "Wilt thou also destroy the righteous with the innocent?" said he; "Shall not the Judge of all the earth do right?"

Nevertheless, according to the reality theory of corporations, Abraham was altogether in error. Every organized body of men is a real person. Its acts and its intentions are its own and not another's. When you punish a corporation for a criminal act, you are punishing the very criminal itself. No one is punished for another's fault. To be sure, the members may be injuriously affected. But so too when an individual criminal is imprisoned or put to death, his wife and his children may suffer, and yet we do not feel that the law is punishing the innocent with the guilty. The penalty is visited upon the real culprit and upon him alone, although incidentally innocent third persons may sustain loss. The case is precisely the same, according to the reality theory, when punishment for crime is inflicted on a corporation. The real criminal is the juristic person, the group-person. Upon that person, the law lays its hand. The shareholders are in fact as well as in law different persons. The law can no more stay its hand against the real wrongdoer, the corporation, because many of the shareholders

[1] As late as 1841, the Supreme Judicial Court of Maine made this objection the basis of a decision that a corporation could not be indicted for maintaining a public nuisance in the erection of a dam across a river. State *v.* Great Works Milling, etc., Co., 20 Me. 41. Said the court: "If indictable as a corporation for an offense * * the innocent dissenting minority become equally amenable to punishment with the guilty majority."

may be innocent, than it can refuse to imprison a husband for larceny, because the loss of his support may cause his innocent wife and children to starve.

Advocates of this theory of corporate existence pride themselves upon the justification which their theory thus affords for the subjection of corporations to the rigors of the penal law. The old theory—the fiction theory—of corporate existence admitted only doubtfully and apologetically the liability of corporations for crime. The new theory, the reality theory, finds such liability natural and just. Indeed, an English writer suggests with much plausibility that "if the realism-theory (with its insistence on 'group-will" and 'group-action') had not offered a firm foundation for attempts to visit corporations with legal punishment, realism would not have been adopted and developed so readily by French and German writers." [1]

While some of the positive features of the reality theory fail to commend themselves to the sober Anglo-Saxon mind, yet its denial of the ancient dogma that a corporation is a creature of the state, existing only in contemplation of law, dependent for its breadth of life upon the fiat of the sovereign, ought to command universal assent: and this emancipation of corporations from that creed out-worn—a creed which would subject them to the same governmental tyranny to which the doctrine of the divine right of kings would have subjected the individual—should more than compensate for the supposedly solid basis which the reality theory furnishes for corporate responsibility for crime.

But what is the explanation of the popular and judicial inclination to subject corporations to criminal liability—an inclination which is so strong as to be a potent factor in the overthrow of the time-honored theory of the nature of corporations? Why should there be this widespread desire to inflict punishment upon the corporation rather than upon the guilty individuals? The answer is nigh at hand—greater ease of proof and certainty of conviction. To adduce sufficient evidence to bring home to particular individuals responsibility for the

[1] Carr, *Law of Corporations*, 198–199.

wrongful acts of corporations is beyond the power of the average state's attorney, not to speak of abler lawyers. Who can search the heart of a corporation? Its ways are past finding out. To prove that a certain act was performed by the corporation is comparatively easy. Without much difficulty you may discover a subordinate employe who performed the physical act in question, but he is generally comparatively obscure and often of little or no financial responsibility. As he acted under orders from his superiors, he is usually comparatively innocent of any moral fault; and even if his legal guilt is established, a jury will be loth to convict. If you attempt to reach the men higher up, almost insurmountable difficulties arise on every hand. The directors will disclaim responsibility—they supposed the executive committee had entire charge of the transaction. The members of the executive committee knew nothing about the matter—they supposed the president attended to such affairs. The president, however, when interrogated, shows that this impression of the executive committee is quite erroneous, as he had no connection with the transaction; or perhaps he will plead his constitutional privilege against self-incrimination. Under such circumstances, is there any wonder that any theory which will permit of punishment being inflicted upon the corporation itself, without any attempt to trace the responsibility to any particular officer or member, should be welcomed as a precious boon to the public?

But latterly a reaction has set in. The infliction of fines upon corporations is thought in some quarters to be a crude and ineffective measure. The innocent suffer and the guilty go free, or comparatively free. The managers of corporations are not, it is argued, deterred from wrongdoing by the possibility of a fine to be imposed upon the corporation—a fine of which their own share, however spectacularly large the whole may be, is almost infinitesimal. Have done with such rough-and-ready measures, is the demand. Cease to fine the innocent shareholders, and imprison the ringleaders in corporate wrongdoing. From Nebraska to Oyster Bay, the cry has gone forth, "A millionaire behind the bars! A trust magnate in stripes!" The scholarly chief executive of New Jersey has given wide

publicity to this popular demand in the shape of the epigram: "Guilt is personal."

He is right. Guilt is personal. It is individual. The philosophic discussions of German jurists will never bring the matter-of-fact Anglo-Saxon to deny this proposition—though he may, and I hope will, be convinced that corporations are not, any more than partnerships, created by the state. The simple, easy method of fining a corporation is neither so just nor so effective as the plan of imprisoning the guilty officers. The problem of the legislator is to balance the certainty of punishment which is attainable by the one method against the more exact justice and greater effectiveness of the penalty which is attainable by punishing the guilty individuals when conviction can be secured.

The problem, therefore, is essentially a practical one. I do not use the word "practical" in the sense indicated by a distinguished lawyer whom Maryland borrowed from Ohio, who defined a "practical" man as one who believes that three times nine is about twenty-seven—that it may go as high as twenty-nine, and in bad years sometimes falls as low as twenty-six. I do not use the word as exclusive of exact thinking; but rather as indicating that this question must be decided by utilitarian considerations. The question is whether, in the long run and all things considered, the ends of justice and the enforcement of the laws will be better promoted by the simpler course of imposing the penalty on the corporation, or by the course of punishing the guilty individuals—a course which, although it is more accurate, more just in theory, and, if it were capable of general enforcement would be more efficient, is yet by reason of the difficulty of enforcement often impossible to carry out; and this question is peculiarly a practical rather than a theoretical one.

The suggestion will naturally be made that a liability should properly be imposed both on the corporation and on the individuals, leaving to the administrative and executive officers of the state a discretion to enforce the penalty against the guilty individuals when sufficient evidence can be obtained, and in other cases to collect a fine from the corporation. But nevertheless to repose such power in any official is repellent to all who

adhere to the old-fashioned doctrine that ours should be a government of laws and not of men; and to permit of punishing both the corporation as a whole and its guilty members is to allow double punishment for the same crime.

I have said that the question whether the corporation or the guilty officers should be haled to the bar of justice is a practical question. So it is, or ought to be; but the risk of interference by the courts with your practical measures, on the ground that they amount to a deprivation of property without due process of law, is ever-present. We must, therefore, be prepared to defend our practical determinations by theoretical reasoning.

For instance, take the real or supposed injustice of punishing the innocent members of a corporation together with the guilty by imposing a fine upon the corporate entity. I am not aware that the constitutionality of legislation having that effect has ever been challenged: but at any moment some desperate advocate may raise the objection, and some willing court accede thereto. If the point be raised, the advocates of such laws must needs be prepared to defend their handiwork, either by the reality theory of corporate personality, or in some other way.

Every true disciple of the common law instinctively revolts against this necessity for justifying the law on philosophic grounds. Trained in the doctrine of *stare decisis*, accustomed to accept the correctness of a judicial decision once pronounced as a premise in all future reasoning, with what fine scorn we contemplate criticism of a decision of a court of last resort because the ruling will not square with sound legal philosophy. A critic who indulges in such useless talk is an irreverent doctrinaire. He would, like Jeffrey, speak disrespectfully of the equator. Away with such a fellow from the earth! Our statute law also develops without much conscious reference to any philosophy of jurisprudence. Our legislatures grope after truth. Feeling, rather than perceiving with the mind, the necessity for a change in the law, they straightway apply a remedy selected by instinct rather than by reason. We have not, as the continentals have, a trained body of jurists to whose philosophic scrutiny proposed laws are submitted.

Much may be said in favor of this haphazard Anglo-Ameri-

can way of letting justice slowly broaden down from precedent to precedent, and of correcting particular evils by experimental legislation. But an essential part of this system, or lack of system, consists in the possibility of applying corrective legislation immediately, whenever a rule, established by judicial decision, is found inconvenient in practise. Consequently, the system works least satisfactorily in respect to constitutional law, where erroneous decisions cannot be corrected by legislation. The courts themselves acknowledge as much when they admit that judicial precedents are entitled to less weight on constitutional questions than in other departments of the law. This should be especially true where the question of constitutionality is in substance legislative—as to the justice or fairness of the statute. For, disavow it as they may, the courts in determining whether a statute accords with the interpretation which they now place upon the constitutional guaranty of due process of law are passing upon the legislative question of the reasonableness or propriety of the measure. For instance, when in Lochner *v.* New York,[1] the Supreme Court of the United States held the New York bakery law unconstitutional, they did so because a majority of the judges differed with a majority of the legislators as to the reasonableness of the regulation.

If such questions of reasonableness are to be decided by the courts, it is incumbent upon our judges to emulate the continental jurists in becoming students of the philosophy of jurisprudence. The high realms into which our erstwhile practical judges are to be carried by the "new constitutional law"—for such in effect it is—may be inferred from the fact that Mr. Justice Holmes in a dissenting opinion has recently been called upon to protest that "the fourteenth amendment does not enact Mr. Herbert Spencer's *Social Statics*."[2]

In these days, when we constantly encounter such decisions as that recently pronounced in which the New York Workmen's Compensation Act was held unconstitutional, a body such as this, deliberating over the reform of the law, must hold its sessions in fear and trembling. Your most carefully drafted measures of reform are liable to be frustrated before they can

[1] 198 U. S. 45. [2] *Ibid.* 75.

be tried. Many lawyers, including myself, have denounced in no measured terms President Roosevelt's criticism of what he was pleased to call reactionary decisions of fossilized judges; and we would not retract one word of remonstrance against such criticism of the courts. In the first place, the critic, not being a lawyer, was incompetent to speak on a legal subject. Secondly, not even a lawyer should permit himself to criticize the decisions of the courts as part of a political argument. Lincoln may have done it; but if so, Lincoln was wrong. Mr. Bryan certainly did it; but Mr. Bryan was also wrong.

But although we maintain the absolute immunity of the courts from criticism in course of political argument, we insist no less strongly upon the right of assemblies such as this to protest—respectfully, earnestly, vigorously—against decisions which we believe to be based on false premises or fallacious reasoning, and therefore to be pernicious as precedents. Such I take to be some at least of the decisions to which President Roosevelt objected—especially those which give to the fourteenth amendment, and other similar constitutional provisions, an interpretation which renders fruitless many deliberations of such bodies as this.

What I plead for is no stretching of the meaning of the constitution in order to fit changed conditions. It is no new interpretation of the constitution for which we entreat. It is the old meaning we thirst for. Back, back, to the meaning of the fathers, and away with the modern glosses and extensions. Hark back to Curtis's opinion in Murray *v.* Hoboken Land Company;[1] hark back to Miller's opinion in the Slaughter House Cases,[2] and you will never find either the fourteenth amendment or any other guaranty of due process of law an obstacle to your reforms. It is the new interpretation—the interpretation which converts the judiciary into an appellate legislature—it is that interpretation which is a menace to democracy, which explains while it can never justify the demand for such measures as the popular recall of judges, and which furnishes the reason for such discussions as the present one.

[1] 18 Howard 600.

[2] 16 Wallace 36.